No. 5983

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE HOW PING, on Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

GEORGE J. HATFIELD,
United States Attorney,

GEORGE N. CROCKER,
Asst. United States Attorney,
Attorneys for Appellee.

Sea , Stratford & Kerr, S. F.

TABLE OF AUTHORITIES CITED

No. 5983

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE HOW PING, on Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

The situation in the present case is as follows:

At the hearing before the Board, three witnesses testified, viz., the applicant, who is fifteen years old; Lee On, his alleged father, who visited China from October, 1913, to June, 1915, and from January, 1921, to November, 1922, and his alleged brother, Lee Hong, aged eighteen, who first came to the United States in November, 1922, and was back in China from October, 1927, to June, 1929 (Tr. pp. 25-26).

Appellant's brief comments upon testimony of other alleged relatives at various times that appellant is the

son of Lee On. None of such testimony connects appellant with Lee On, but is merely to the effect that Lee On had a son of the name claimed by appellant.

All the testimony shown by the prior records of the Immigration Service over a period of years relative to Lee How Ping, reputed son of Lee On, is that said Lee How Ping lived with his brother, Lee Fong, in their uncle's house in the home village from the time their mother died in 1916 until Lee On returned to China in 1921. The alleged father and brother of appellant so testified at this hearing (Tr. pp. 26-27). The alleged brother testified further that he and Lee How Ping lived in the same room in his uncle's house during that period (Tr. pp. 27-28).

On the other hand, appellant testified that while he himself was living in his uncle's house during the period mentioned, he does not remember that Lee Fong, his alleged brother, ever lived in the same house with him; that he does not remember that Lee Fong ever lived in his uncle's house; and that he has never been told that such was the case (Tr. p. 28).

The testimony shown by the prior records of the Immigration Service relative to this family is also to the effect that Lee How Ping, reputed son of Lee On, attended school in the home village with his brother, Lee Fong, for a period of slightly less than two years before the latter came to the United States in 1922 (Tr. p. 29, 30), and that he also was attending school at that place with his cousin, Lee Sing (Tr. p. 29, 30, 31). The testimony shows that this alleged cousin was

attending that school as late as 1926 (Immig. Rec. 27285/5-27 p. 14), and that Lee How Ping attended that school since 1921 (Imm. Rec. 55701/444, pp. 16, 18, 26).

On the other hand, appellant definitely testifies that he does not remember that he ever attended school with his alleged brother, Lee Fong; that he does not remember that he ever attended school with his alleged cousin, Lee Sing; that he himself was eight or nine years old when Lee Fong first came to the United States, and that Lee Fong did not attend school with him before Lee Fong first came to the United States, and that he does not remember what Lee Fong was doing before he came to the United States in 1922 (Tr. pp. 32, 33).

Appellant argues that these conflicts are wholly immaterial to the issue of relationship, and further, that the applicant may have forgotten these matters, due to his immature age at the time involved.

These particular items are not in any sense collateral. Appellant's testimony on these points is directly opposed to what all the other testimony would tend to show, relative to whether or not Lee How Ping, reputed son of Lee On, had been living with the members of Lee On's family. Relative to a similar situation, this Court said, in the very recent case of *Yee Mon vs. Weedin,* 34 F. (2d) 266, that such testimony of the applicant would tend to show that he did not live with the family of his alleged father during the period mentioned, and consequently, that he is not

the son of his alleged father. The Court said further, that whether there may be some other explanation of the discrepancy was a question for the Immigration authorities.

Appellant's suggested explanation that such testimony of his was due to his immature age during the period referred to, is not convincing. Certainly, if he lived in the same room in the same house with his alleged brother until he had reached the age of seven years (American reckoning), he should have some recollection or knowledge, derived from other sources, of that fact. Furthermore, the period involved relative to the school attendance, relates to a period up to the end of 1922, when appellant would be over eight years of age (American reckoning). It should be borne in mind that the village is said to consist of but twelve dwellings and one school (Imm. Rec. 55701/444, p. 15). Certainly, appellant should not be utterly ignorant of the fact that he attended school with his alleged brother when he was eight years of age, especially since this matter, and the other matter relative to his residence with his brother, were specifically called to his attention.

Moreover, the alleged cousin is said to have been attending school up to 1926, with appellant, and at that time appellant would have reached the age of twelve years.

Since on these points the conflicting evidence relates directly to the fact of whether or not appellant has been living with the members of his claimed family,

and conducting himself as a member of such family, the case of *Gung You vs. Nagle,* 34 F. (2d) 848, is not in point, since the discrepancies discussed in that case related solely to collateral matters.

The third conflict is this:

Lee Fong, appellant's alleged brother, testified that he was last in China from October, 1927, to June, 1929; that when he arrived home on that visit Lee Wah Nai, *who resided in the house directly adjacent to his own home,* was living there, but that he died about a month afterward (Tr. pp. 34, 35).

Appellant testified that as far as he knows, he has never seen the person referred to, and he only heard that such person was abroad (Tr. p. 35). He testified further that there were no deaths in the home village while his brother was last in China, and no funerals held in the village during that time. He testified that if there had been any deaths or funerals in the village, he would know it, and that no one died or was buried in the village since he has been able to understand anything (Tr. p. 36).

Appellant's attention was particularly directed to the house in question, and he was asked whether any one had died in that house while his brother Lee Fong was last in China, and answered in the negative (Tr. p. 36).

Since appellant's immature age obviously cannot be invoked on this point, the explanation suggested in appellant's brief is that the mention of death is taboo

among Chinese. Apparently this alleged taboo did not inhibit Lee Fong from testifying in detail as to the death of this person. Furthermore, appellant himself testified as to a death in several other instances:

(a) That his mother died in 1921 (Imm. Rec. 55701/444 p. 24);

(b) That his grandfather is dead (Id. p. 25).

The next conflict is as follows:

Lee Fong testifies that while he was last in China from October, 1927, to June, 1929, one Lee Yen Nai was living in the house directly behind his own house, and that he had seen this person every day during that period (Tr. pp. 36, 37).

On the other hand, appellant testified positively that this person has gone to a foreign country, and did not live in the house mentioned while his alleged brother was last in China, and that he did not see this person in the home village during that period (Tr. pp. 37, 38).

This Court has uniformly held that the decision of the immigration board will not be overturned unless it is a capricious and arbitrary abuse of discretion and completely without support in the evidence before the Board.

Quan Jue v. Nagle, (C.C.A.) 5868, decided October 28, 1929;
Chin Share Nging v. Nagle, 27 F. (2d) 848;
Hom Dong Wah v. Weedin, 24 F. (2d) 774.

In Chin Share Nging v. Nagle, supra, the principal

discrepancies related to occupants of the two houses adjoining the applicant's alleged residence.

Certainly, upon the record as made in this case, there was substantial evidence that appellant had not been living in the family of his alleged father over the period of years claimed, and hence, that he is not the son of said father. This Court has recently said that the question of whether or not there is an explanation of the discrepancies is one for the immigration officers.

> *Quan Jue v. Nagle,* (C.C.A.) 5868, decided October 28, 1929;
> *Yee Mon v. Weedin,* supra.

Appellant then injects into his brief several irrelevant and frivolous complaints, and considerable vituperation and invective directed at the administrative officers. The first of these is directed at the statement in the record that the applicant was "advised as to the nature of, and the penalty of the crime of perjury" (Imm. Rec. 55701/444, p. 11). It is difficult for us to conceive what possible objection or criticism can arise by reason of the fact that the significance of an oath was explained to the applicant, a Chinese boy.

It is also complained that appellant was held at Angel Island nearly two months before his case was heard. In the first place, delay of the commencement of the hearing is immaterial,

> *Quon Quon Poy v. Johnson,* 273 U. S. 352,

and in the second place, such delay as occurred in this particular instance was largely due to the lack of

prompt action on the part of appellant's counsel in producing the affidavits of appellant's witnesses, which are required by the rules, in order to permit of the case being set. Appellant arrived on June 26th, and an attorney filed an appearance on that date (Imm. Rec. 55701/444, p. 2). The following day, said attorney was notified to file his affidavits of witnesses promptly (Id. p. 4), and the first affidavit was filed on July 12th (Id. p. 6). Thereafter, the attorney was advised that since the records indicated the presence in the United States of the alleged stepmother of appellant, her testimony would appear to be pertinent (Id. p. 7), and on July 30th, said attorney advised that he did not desire to produce that witness (Id. p. 8). Two days later the case was set for hearing on August 15th, on which date it was heard (Id. pp. 9-11).

We respectfully submit that no abuse of discretion on the part of the immigration authorities has been shown in the case before this Court; that the decision of the executive is based upon material discrepancies in the testimony, which cast serious doubt upon the existence of the claimed relationship; and that the judgment of the Court below should be affirmed.

Respectfully submitted,

GEORGE J. HATFIELD,
United States Attorney,

GEORGE N. CROCKER,
Asst. United States Attorney,
Attorneys for Appellee.